IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON **PLAINTIFF**

V. **CAUSE NO.: 2:07CV42-P-A**

ONE AMERICA PRODUCTIONS, INC., EVERYMAN PICTURES, TWENTIETH CENTURY-FOX FILM CORPORATION AND JOHN DOES 1 AND 2 **DEFENDANTS**

PLAINTIFF, ELLEN JOHNSTON'S, RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE CLAIM AND MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO AMEND COMPLAINT TO ADD ADDITIONAL GROUND

COMES NOW, Plaintiff, Ellen Johnston, by and through counsel, W.O. Luckett, Jr. of Luckett Tyner Law Firm, P.A., and files and serves her Response to Defendant's Motion to Dismiss for Failure to State Claim and states for the reasons set forth below that Ms. Johnston's claim should not be dismissed:

INTRODUCTION

This is an action by Ellen Johnston against the Defendants arising out of the Defendants' depiction of the Plaintiff without her consent, in the theatrical movie release, *Borat*, which has now also been released in DVD format. The Defendants have attached several exhibits to their Motion to Dismiss, claiming that they are self-authenticating. Defendants have filed a Rule 12(b)(6) motion to dismiss Ms. Johnston's Complaint based upon the Defendants' belief that the allegations of the Complaint fail to state a claim upon which relief can be granted. Defendants have presented "matters outside the pleading" (See exhibits 2, 3 and 4 to the Defendants' Motion.) Thus, pursuant to Rule 12(b)(6) (assuming these matters are not excluded by the Court) the motion should be

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treated as one for summary judgment and disposed of as provided in Rule 56. Rule 12(b) provides further that "All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 56 permits the use of supporting Affidavits.

Defendants attempt to convince the Court that the claim should be dismissed because there is a dearth of factual allegations which give rise to a theory of "plausible liability." At the offset, Plaintiff notes that the Federal Court (with some limited specific exceptions) is a forum with "notice pleadings"[1]. . Here the Plaintiff has clearly identified by short and plain statement the grounds upon which the Court's jurisdiction depends. Apparently, jurisdiction is not contested by the Defendants. Moreover, the Plaintiff has set forth a short and plain statement of the claim showing that the pleader is entitled to relief. She alleged in her Complaint the general theories of invasion of her privacy. See paragraph four of Plaintiff's Complaint. This invasion was done without her consent, (see paragraph 4 of Plaintiff's Complaint), with the full intent of showing her image onscreen which in effect portrayed Plaintiff in a false light, and which mocks Plaintiff's religion. Moreover, she pleads that she was "led to believe that Mr. Cohen's camera crew was filming a 'religious documentary'". Such pleadings are more than sufficient to place the Defendants on notice of the nature and content of her claim. Plaintiff also has satisfied the third condition set forth in Rule 8 by making a claim for damages. Ms.

1

Rule 8 FRCP states that it is sufficient in a claim for relief to set forth in a Complaint (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) demand for judgment that the pleader seeks.

Johnston set forth the fact that the filming took place in an interior setting where Plaintiff had an expectation of privacy.

> " The right of privacy can take several forms. For your purposes, it covers several traditional items: You cannot "out" someone in any way. You cannot reveal the private facts of someone's life . You cannot intrude into someone's private space in the course of your filmmaking. These activities invade someone's right of privacy. Everyone has a bubble of privacy around them. That privacy bubble can be burst in various ways. One is the disclosure of private facts. Not lies. Not distortions. Facts. These private facts, however, must be of a kind that, when disclosed without permission, would be highly offensive to a hypothetical ordinary and reasonable person..."

See Page 61 of *Clearance and Copyright: Everything the Independent Filmmaker Needs to Know* attached hereto as **Exhibit A**.

The basis for the Plaintiff's allegations against the Defendants is that her right to privacy has been invaded. In particular, the Plaintiff has been portrayed in a highly offensive false light, and the Defendants' have misappropriated the Plaintiff's likeness for their own commercial use and benefit without her consent. The Plaintiff also seeks leave of the Court to amend her Complaint to assert a claim of intentional infliction of emotional distress.

Standard of Review

Even in cases involving claims of invasion of privacy, which necessarily involve free speech rights, Rule 12(b)(6) Motions are disfavored and are rarely granted. *Meyers* *v. Guardian Life Insurance Company of America, Inc.*, 5 F. Supp.2d 423, 427 (N.D. Miss. 1998). See, also, *American Guaranty and Liability Insurance Company v. 1906 Company*, 273 F.3d 605, 615 (5th Cir. 2001). Contrary to the Defendants' contention that the standard of review as announced in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) has been "retired" by the United States Supreme Court in *Bell Atlantic Corporation v. Twombly*, 127 Sup. Ct. 1955, 1968 (2007), the standard remains the same. The Supreme Court, in *Twombly*, simply clarified that the Court should not read *Conley's* "no set of facts" standard so as to permit a wholly conclusory statement to survive a Motion to Dismiss. In this case, however, the essential facts are clearly set forth in the Complaint. The facts supporting the Plaintiff's claim include the following:

- The Plaintiff is portrayed at a church camp meeting, participating in a religious service in which the movie character Borat experiences a religious conversion.

- The Plaintiff, who was aware of the film crew, was told that the film crew was there for purposes of making a documentary, which was a false statement, and any implied consent by the Plaintiff to being filmed is therefore null and void.

- The Plaintiff was also led to believe that "Borat" was an actual person, who was legitimately suffering a spiritual crisis when he came to the camp meeting, and actually experienced a religious conversion, leading the Plaintiff to raise her hands and praise God.

- In fact, the actor portraying Borat, Sacha Baron Cohen, intentionally faked a religious conversion in order to prompt the Plaintiff into "performing" for his film crew in order to make use of the depiction of her religious worship in a mockery of the Plaintiff's individual beliefs and of the Plaintiff herself.

- In the finally edited version of the film *Borat*, the Plaintiff is not portrayed in a documentary version of a camp meeting wherein Borat experiences religious salvation, and in which the Plaintiff participates. Rather, the viewing audience is aware that Borat is a complete fiction, they are aware that his ostensible purpose as the

> character Borat is to find and ultimately "wed and bed" Pamela Anderson, and the audience is given the false impression that the Plaintiff and the others depicted in the movie are either willing participants in a parody of their religion, or are complete and utter fools to be made fun of by the audience.

In other words, the Complaint clearly references a set of facts in which the Plaintiff was led to participate in a religious service under false pretenses that Borat was a real person experiencing a genuine religious moment and that this was being recorded for use as a documentary, not as a parody. As can be seen by a review of the Plaintiff's attached Affidavit, which is made a part hereof in opposition to the Motion attached as **Exhibit B**. Her own son telephoned her after having seen the movie, and he was appalled to have seen his mother in such a vulgar movie. He asked her questions about how this happened, how she ended up in he movie. This was the first notice the Plaintiff had that a movie had been made that was being shown not only in Mississippi, but nationwide. Also See **Exhibit C**, Affidavit of Craig Johnston. Again, the Plaintiff was under the belief that this was a religious documentary to be shown in a foreign country. This was not a gathering such as one might find in a football game as a spectator where people buy a ticket for admission and on the rear of the ticket there is a written waiver that their likeness or image may be shown and with purchase they agree to be filmed or photographed.

As shown by statements made by Sacha Baron Cohen, the film's lead actor, in an interview with National Public Radio, see copy of transcribed excerpt of interview and Affidavit of Carol Edwards attached hereto as **Exhibit D**, the fraud perpetrated on the Plaintiff to obtain her participation in the film was a central, material and, indeed, integral requirement for the film.

Dismissal is never warranted because the Court believes that the Plaintiff is merely unlikely to prevail. *Meyers*, at 427. Even if it appears almost a certainty that the facts alleged can not be proved, the Complaint can not be dismissed so long as it states a colorable claim. *Id.* See, also, *Mitchell v. McBride*, 944 F.2d 229, 230 (5th Cir. 1991).

Invasion of Privacy

Under Mississippi Law, which governs in this diversity action, persons are afforded a substantial zone of freedom which, at their election, may be kept private. This zone surrounds person and place and without that person's consent may not be invaded by other persons. *Deaton v. Delta Democrat Publishing Company*, 326 So.2d 471, 473 (Miss. 1976).

The Mississippi Supreme Court has made no effort to identify the outer limits of a person's right of privacy under the common law of this jurisdiction. *Young v. Jackson*, 572 So.2d 378, 381 (Miss. 1990). Mississippi has recognized a right of action for invasion of privacy in at least the following contexts: (1) the portrayal of a Plaintiff in a false light, *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 79 (Miss. 1986); (2) appropriation of a Plaintiff's likeness and un-permitted use thereof, *Candebat v. Flanagan*, 487 So.2d 207, 209 (Miss. 1986); and (3) public disclosure of private facts, *Deaton v. Delta Democrat Publishing Company*, 326 So.2d at 473. See, also, *Young v. Jackson*, supra, at 382.

In this case, the Defendants seek dismissal by arguing that: (1) the depiction of the Plaintiff was with her consent; (2) the depiction of the Plaintiff was truthful; and (3) the movie in question is not sufficiently "of and concerning" the Plaintiff to survive a Motion to Dismiss for failure to state a claim. It is respectfully submitted that these are questions for ultimate determination by jury. While the Court is required to make a threshold determination as to whether or not the matters complained of portray the Plaintiff in a false light, whether or not the depiction is highly offensive, and whether or not the depiction is of and concerning the Plaintiff, it is submitted that the facts as set forth in the Complaint, augmented by the exhibits filed on behalf of both parties, more than sufficiently demonstrate an affirmative answer to those threshold questions, and that the Plaintiff is entitled to have the ultimate decision made by a jury.

Lack of Consent

With regard to false light portrayal, appropriation of the Plaintiff's likeness, and publication of private facts, consent is not a defense if that consent is obtained under false pretenses. In this case, the Defendants are not arguing that they obtained written consent from the Plaintiff, but that her consent may be inferred from her participation in the camp meeting even though she knew it was being filmed. However, as clearly alleged in the Complaint, her participation was obtained via false and fraudulent statements that the filming was for a documentary. This is not a situation in which a documentary was being filmed, and then the documentary footage was subsequently used in a parody. Rather, the filming was obtained by the Defendants with the present, undisclosed intent to use the footage for a purpose other than that being represented. This is as clear a case of fraud as the Court is ever likely to be confronted with. In the interview conducted by Terry Gross, of the NPR program *Fresh Air*, Sacha Baron Cohen not only admits the fraud but states that it is something that he is "quite rigorous about". Indeed, even after obtaining the participation of victims such as the Plaintiff, he doesn't let them know about the deception (as Terry Gross phrased it, "like Candid Camera"), leaving persons such as the Plaintiff to discover the fraud on their own, if ever.

A jury would be justified in concluding that the reason Mr. Cohen does not inform participants in his films such as the Plaintiff of his real purpose is that they would not give their consent to be portrayed in an offensive, demeaning, and false light.

Because the Plaintiff participated in the filming under false pretenses, her consent is not authentic, and can not be used as a defense or ground for dismissal. See, *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); and *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984).

False Light Portrayal

The Defendants' contend that dismissal is in order because the Plaintiff is simply portrayed as worshiping in a truthful and honest depiction of the religious service. In addition the Defendants' claim that the mere fact that the movie pokes fun at the Plaintiff's religion does not constitute grounds for an action against the Defendants. The Defendants, however, are missing the point. If the Defendants had simply made a documentary, or even obtained film footage of a documentary in which the Plaintiff was participating in a religious service, and proceeded to make fun of the Plaintiff and others of her denomination, it is doubtful that an action could be maintained. In this case; however, there is no "documentary". There is a lie. What the Defendants and Sacha Baron Cohen did in this case was to film a fraud being perpetrated on the Plaintiff and others. Anyone seeing the film would more probably than not receive the impression that persons such as the Plaintiff are either participating in a parody of their religion, or have subsequently granted their consent to the use of their participation in such a parody. That is Sacha Baron Cohen's essential "shtick". In either event, the Plaintiff is being falsely portrayed as a willing participant in a mockery of her own religious beliefs.

If it is actionable to falsely portray someone as being genuinely religious when they are not, then it should be actionable to portray them as mocking their religion when they in fact hold deeply held religious convictions. See, *Strickler v. National Broadcasting Company, Inc.*, 167 F.Supp. 68 (S.D. Cal. 1958), in which the Court held that it was a question of fact whether portrayal of the Plaintiff as praying during an air-time emergency was "offensive".

An action for false light invasion of privacy, unlike an action for defamation, does not require that the Plaintiff establish that the publication complained of is false. The focus is instead upon whether the Plaintiff is presented, even using a truthful account, in a false light. § 652E of the Restatement (Second) of Torts, adopted by the Mississippi Supreme Court in *Prescott v. Bay St. Louis Newspaper,* supra, states:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the published matter and the false light in which the other would be placed.

In this case, it is undisputed that the movie in question has been the subject of intense publicity. Indeed, as counsel for the Defendant notes, it is an "award winning" film. Portraying someone as participating in a parody or mockery of their religious beliefs, is likely to be highly offensive to a reasonable person. At a minimum that question should be left to a jury for decision. *Strickler*, supra, at 71.

Finally, in this case, the Defendants not only had knowledge of the false light in which the Plaintiff was placed, they created that false light as an essential element of the publication. Indeed, that is the central thesis of the movie: to obtain, through chicanery, trickery and fraud, the unwilling participation of private individuals in a mockery of their religious and social values. Such conduct is not protected by the First Amendment.

Although not reported as a published decision, a film maker who produces similar parodies, Michael Moore, was subjected to liability for false light invasion of privacy for a brief scene shot as a part of Larry Stecco, a person attending a public benefit, out of context in order to make it appear that Stecco was out of touch with the plight of the citizens of Flint, Michigan. The depiction of Stecco (who was not identified in the movie) at a public event and the statements made by him were truthful, yet portrayed him in a false light, resulting in liability for Michael Moore and Warner Bros. Studios. See, *Clearance and Copyright: Everything the Independent Film Maker Needs to Know, Second Edition*, Michael C. Donaldson (Silman-James Press, Los Angeles 2003) (excerpt attached).

The Depiction Complained of is Clearly Directed at the Plaintiff

As stated above, the central thesis or premise of the film, *Borat* is to obtain the unwilling participation of persons such as the Plaintiff in mocking themselves. The motivation and execution underlying the film is not only outrageous, it is cruel. It is intended to injure. It is, to put it bluntly, commercial hate speech.

If Defendants wanted to make a parody of fundamental religious beliefs and other similar social values or morals in the United States, they could hire actors to portray persons such as the Plaintiff, or they could obtain the knowing and informed consent of persons such as the Plaintiff either before or after filming them. What they can not do, legally, is portray persons such as the Plaintiff in a false light without their consent.

As made clear in his interview with the NPR program *Fresh Air*, Sacha Baron Cohen wants to obtain the "real experience". This is central to his film making and he is "quite rigorous" about that. The entire film is "clearly directed" at persons such as the Plaintiff. Indeed, it is of and concerning her.

Moreover, she is clearly recognizable, and, as anticipated by Sacha Baron Cohen, she is recognized and questioned by relatives and friends as to her appearance in the film. (See Affidavit of Craig Johnston and Affidavit of Ellen Johnston.) In Sacha Baron Cohen's interview with *Fresh Air* he states:

> "I think 99% of people don't um, you know a lot of them hear about it and I've obviously been doing this for many years – a lot of them hear through their kids who suddenly call them up and go dad you're on T.V. on the Ali G show and they suddenly you know achieve this kind of street cred."

Unlike the Complaint advanced in *Mitchell v. Random House, Inc.*, 865 F.2d 664 (5th Cir. 1989), the movie *Borat* won't work without the portrayal of a genuinely religious person such as the Plaintiff being placed in a false light. Again, this is Sacha Baron Cohen's fundamental "shtick". The "shtick" doesn't work unless the persons portrayed are gulled into participating based upon the premise that the *Borat* figure is legitimate and he is, in actuality, a documentary film maker from Kazakhstan. If Defendants want to stay clear of running afoul of the law, however, then they must either adhere to the representations that were originally made to obtain the Plaintiff's participation, or obtain the Plaintiff's knowing consent in the participation in a parody of her religion. Anything else places the Plaintiff in a false light and is clearly and unmistakably directed at her; just as Michael Moore's film, while primarily focused on Roger Smith and the automotive industry, was also clearly and unmistakably directed at Larry Stecco, the former attorney, now Judge, who was the Plaintiff in the false light suit against Moore referenced above.

Misappropriation of the Plaintiff's Likeness for Commercial Gain

Section 652C of the Restatement (2d) of Torts provides:

> "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy".

The classic scenario in which one's likeness or name may be misappropriated is in connection with advertising. However, the Rule is not limited to commercial appropriation. It applies also when the Defendant makes use of the Plaintiff's name or likeness for any purpose beneficial to the Defendant. See, Comment b to § 652C of the Restatement (Second) of Torts (1977). Accordingly, the use of the Plaintiff's research and opinions attributed to the Plaintiff, who had some standing in the scientific community, can be the subject of an action for misappropriation even though the use by the Defendant was in a work of fiction. *Bromhall v. Rorvik*, 478 F.Supp. 361 (E.D. Pa. 1979). Where, as here, the ostensible use of the Plaintiff's likeness was with consent, liability may attach where the scope of the consent is exceeded, or the consent is not valid due to fraud. See, *Hinish v. Meier and Frank Company*, 113 P.2d 438 (Or. 1941); and *Wood v. Hustler*, supra. The misappropriation does not require that the person's likeness be the central or sole subject of the publication. It is sufficient if the person's likeness can be identified and is relevant to the theme or purpose of the publication benefitting the Defendant. See, *Battaglia v. Adams,* 164 So.2d 195 (Fla. 1964); *Schwartz v. Edrington,* 62 So. 660 (La. 1913); and *Hamilton v. Lumbermen's Mutual Casualty Company,* 82 So.2d 61 (La. App. 1955). Where the publicity is given for the purpose of gaining a benefit from commercial or "other values" associated with the name or likeness, the right of privacy is invaded. Section 652C, Restatement (Second) of Torts (1977) Comment d.

Here, the value in appropriating the Plaintiff's likeness was that she was the "genuine article". She fulfilled Defendants' requirement that they obtain the "real experience". Because their use of the Plaintiff was necessary to obtain the desired commercial benefit they were seeking, they are liable for invasion of privacy. *Moore v. Big Picture Company,* 828 F.2d 270 (5th Cir. 1987).

Conclusion

The Court does not have to look beyond the allegations of the Complaint to determine that a cognizable claim is asserted both factually and legally for invasion of privacy. To the extent that the Court requires more, at this initial stage of the litigation, ample support for the claims against the Defendants can be found in the exhibits attached by the parties to their respective pleadings.

In addition to her claims for invasion of privacy, moreover, and as discussed above, there are more than sufficient grounds for permitting the Plaintiff to amend her Complaint so as to assert an additional claim for intentional infliction of emotional distress for the outrageous and highly offensive actions of the Defendants. Accordingly, Plaintiff states that Defendants' motion to dismiss her pending claim should be denied, and that she be granted leave of Court to file an amendment to Complaint so as to assert the additional ground of intentional infliction of emotional distress.

Respectfully submitted,
ELLEN JOHNSTON

/s/ W.O. Luckett, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2007 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following person: **John Henegan.**

/s/ W.O. Luckett, Jr.
W.O. LUCKETT, JR.